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State of Washington  
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NO. 56302-9-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

ORLANDO BYRD,

Appellant.

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Appeal from the Superior Court of Pierce County  
The Honorable Matthew Hummel Thomas

No. 20-1-01878-5

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

Orlando Byrd pleaded guilty to theft in the second degree, assault in the fourth degree, and violation of a protection order. All three convictions were designated as domestic violence offenses. The trial court ordered Byrd to complete a domestic violence evaluation and follow-up treatment as a condition of both his felony judgment and sentence and his two-year suspended sentence. The State agrees the condition should be stricken from Byrd's felony judgment and sentence, because the trial court lacked the statutory authority to impose it. However, the court had the authority to impose the condition as part of Byrd's suspended sentence. Therefore, this Court should remand for the trial court to strike the condition from only the felony judgment and sentence.

## **II. RESTATEMENT OF THE ISSUES**

- A. Should the sentencing condition requiring Byrd to complete a domestic violence evaluation and treatment be stricken from the felony judgment and sentence when imposition of this condition exceeded the trial court's statutory authority?

### **III. STATEMENT OF THE CASE**

On July 17, 2020, the State charged Orlando Byrd with robbery in the first degree and felony harassment, both domestic violence related. CP 1-3. The allegations were that Byrd punched victim Nikita Williams in the face several times, stole her purse at gunpoint, and told her, “I’ll kill you bitch.” CP 46-47. Williams and Byrd had a past dating relationship. CP 46-47.

The case proceeded to jury trial. 1RP<sup>1</sup> 2, 18. After the State rested its case, Byrd elected to plead guilty. 1RP 2; 2RP 5. He pleaded guilty to an amended information which charged him with theft in the second degree, assault in the fourth degree, and violation of a protection order (VPO). CP 4-19; 1RP 13-15. All three counts were charged as domestic violence related. CP 16-19. The State agreed to recommend credit for time served on the felony theft count and a two-year suspended sentence on the

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<sup>1</sup> The verbatim report of proceedings from August 18, 2021, will be referred to as “1RP,” and the verbatim report of proceedings from sentencing on October 1, 2021, will be referred to as “2RP.”

assault and VPO counts.<sup>2</sup> CP 7; 1RP 9. The State also agreed that although it would recommend that Byrd complete a domestic violence evaluation and any follow-up treatment, Byrd could argue against that condition. CP 7; 1RP 9.

The trial court sentenced Byrd to credit for time served as agreed by the parties and imposed a two-year suspended sentence on the assault and VPO counts. CP 25-26, 33-37. The court also ordered Byrd to complete a domestic violence evaluation and any follow-up treatment. CP 25, 36-37. That condition was imposed on both the suspended sentence for the gross misdemeanor offenses and the felony judgment and sentence. CP 25, 36-37. Byrd timely appealed. CP 41.

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<sup>2</sup> Assault in the fourth degree and VPO, as charged, are both gross misdemeanor offenses. *See* RCW 9A.36.041(1)(2); RCW 26.50.110(1).

#### IV. ARGUMENT

**A. The State Agrees the Sentencing Condition Requiring Byrd to Complete a Domestic Violence Evaluation and Follow-Up Treatment Should Be Stricken From the Felony Judgment and Sentence.**

The State agrees that the trial court lacked the statutory authority to impose the domestic violence evaluation and treatment condition as part of Byrd's sentence for second-degree theft. Remand is therefore appropriate so the condition may be stricken from the felony judgment and sentence. However, the trial court had the statutory authority to impose the condition as part of Byrd's suspended sentence, and Byrd does not challenge the condition as to his gross misdemeanor convictions. The condition should thus remain as ordered on his suspended sentence.

"In Washington, the SRA<sup>3</sup> prescribes the authority to sentence in felony cases." *In re Post-Sentence Review of Combs*,

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<sup>3</sup> "SRA" refers to the Sentencing Reform Act of 1981, codified at chapter 9.94A RCW.



176 Wn. App. 112, 117, 308 P.3d 763 (2013). A trial court’s sentencing authority is limited to that “expressly found in the statutes.” *Id.* Whether a sentencing court has exceeded its statutory authority is a question of law reviewed de novo. *State v. Button*, 184 Wn. App. 442, 446, 339 P.3d 182 (2014); *State v. Mann*, 146 Wn. App. 349, 357, 189 P.3d 843 (2008).

Under RCW 9.94A.505(9), “As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” Absent some specific authorization in the SRA, a trial court cannot require a defendant to perform affirmative conduct. *See Button*, 184 Wn. App. at 447 (“[A]ny order directing an offender to affirmatively do something is an affirmative condition and must be expressly authorized by the SRA.”). Obtaining a domestic violence evaluation and engaging in treatment is affirmative conduct. *See, e.g.,* RCW 9.94A.703(3)(c)-(d); *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

Here, the State concedes that the trial court lacked the statutory authority to impose the domestic violence evaluation and treatment condition as part of Byrd's felony judgment and sentence. If a court sentences a defendant to a term of community custody, then the court may order the defendant to "[p]articipate in crime-related treatment or counseling services," or "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c)-(d). However, the crime of theft in the second degree does not fall within any of the categories eligible for community custody under RCW 9.94A.701(1)-(3) or RCW 9.94A.702, and the trial court here (correctly) did not impose a term of community custody. The State cannot find any other provision of the SRA which would allow the trial court to impose the condition as part of Byrd's felony theft sentence. *See, e.g., Button*, 184 Wn. App. at 447 (holding the trial court lacked authority to require defendant

convicted of first-degree theft to display a sign advertising her crime). The State therefore agrees that this Court should remand for the trial court to strike the condition from Byrd's felony judgment and sentence.

However, the trial court had authority to impose the domestic violence evaluation and treatment condition as part of Byrd's suspended sentence on the assault and VPO convictions. *See* CP 35-37. "Our trial courts have great discretion in imposing sentences within the statutory limits for misdemeanors and gross misdemeanors." *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009). RCW 9.95.210(1) grants the trial court authority to suspend the sentence of a criminal defendant and to impose conditions. *See also* RCW 9.92.060(1). "When imposing a suspended sentence for a gross misdemeanor, a superior court may impose probationary conditions that are reasonably related to either reparation or rehabilitation." *State v. Arteh*, No. 76469-1-I, 2018 WL 3629167, at \*2 (Wash. Ct. App. July 30, 2018)

(unpublished) (citing *State v. Eilts*, 23 Wn. App. 39, 44, 596 P.2d 1050 (1979)).

Here, both the assault and VPO charges to which Byrd pleaded guilty were domestic violence related. CP 4, 13-14, 17-19. The trial court imposed a two-year suspended sentence and ordered Byrd to complete a domestic violence evaluation and any follow-up treatment as a condition of that suspended sentence “based on the testimony that the Court heard as well as [Byrd’s] criminal history. CP 33-37; 2RP 13. The trial court had the statutory authority to do so, and Byrd does not challenge the condition of his suspended sentence. Therefore, this Court should remand only for correction of Byrd’s felony judgment and sentence.

## **V. CONCLUSION**

For the foregoing reasons, the State agrees the domestic violence evaluation and treatment condition should be stricken from Byrd’s felony judgment and sentence.

This document contains 1,265 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 23rd day of June, 2022.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Gig Harbor, Washington on the date below.

6/23/2022  
Date

s/ Kimberly Hale  
Signature

# PIERCE COUNTY PROSECUTING ATTORNEY

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## Transmittal Information

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